UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OMAR RASHAD POUNCY,

Petitioner,

v. Case No. 13-14695

CARMEN D. PALMER,

Respondent.

_____/

PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE MATTHEW M. LEITMAN
United States District Court
Wednesday, June 17, 2015

APPEARANCES:

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E X H I B I T S

IDENTIFICATION	MARKED	RECEIVED
None.		

Motion For Summary Disposition 6-17-2015

Detroit, Michigan

Wednesday June 17, 2015

1:58 p.m.

THE CLERK: The Court calls case number 13-14695, Omar Rashad Pouncy versus Carmen D. Palmer.

Counsel, please state your appearances for the record.

MR. MOFFITT: Good afternoon, Your Honor. David L. Moffitt on behalf of Omar Rashad Pouncy, the petitioner, who's present to my right. We thank you for letting him be here today.

THE COURT: Sure. Who else is with you?

MR. MOFFITT: This is Julia Jednak of my staff.

MR. PALLAS: Good afternoon, Your Honor.

John Pallas, Assistant Attorney General on behalf of respondent Carmen Palmer.

MR. GOODKIN: Assistant Attorney General David Goodkin also on behalf of respondent.

THE COURT: Okay. Thank you.

Mr. Pallas, which one of you will be arguing today?

MR. GOODKIN: I will, Your Honor.

I may -- if there's a particularly difficult question, if it's okay with you, I may have Mr. Goodkin address the Court. But it will be me who will be

arguing for the State.

THE COURT: I'll try to avoid all difficult questions.

Okay. We're here this afternoon for argument on the motion for summary judgment filed by Mr. Pouncy. It's filed with respect to one of the claims in the petition. And let me started with a few thoughts.

When I was on your side of the bench, I appeared a number of times before my now colleague Judge O'Meara. He had a helpful way of starting off hearings by offering some initial thoughts, his initial inclinations and suggesting where argument might be helpful. So let me start with that.

And you're, of course, free to argue whatever you want, but this may help you. If your goal is to move the needle with me, it might be helpful to talk about the things that I'm thinking about.

There have been a number -- there's a been a lot of briefing related to the issue of whether there has been a waiver of the claim that the trial court improperly closed the courtroom during jury *voir dire*.

My inclination is that there was not a waiver.

So, Mr. Moffitt, you don't need to spend much time, if any, on the waiver issue.

Mr. Pallas, you're certainly free to address that.

I don't see -- I'm not sure that the State is even claiming, but I don't see any basis for finding a procedural default of the issue that's been raised here.

So, Mr. Moffitt, you don't need to talk about that. And, Mr. Pallas, you can argue that if you wish to and then Mr. Moffitt could respond.

There's been some briefing on the issue of whether there's a, a *Teague* or retroactivity problem here with respect to Mr. Pouncy's reliance on the *Presley* case.

My initial inclination is that he may fairly rely on that case. So, Mr. Moffitt, you don't need to spend time convincing me of that.

Mr. Pallas, that's certainly something you may want to argue if you believe there's a retroactivity or *Teague* problem. I'm happy to hear from you on that. I'm trying to make this more efficient.

My current view is that the resolution of this motion comes down to the question of whether there is clearly established law based on the holdings of the United States Supreme Court that, absent an objection, the state trial court was bound to undertake the *Waller* analysis before closing the courtroom and could not close the courtroom without making certain findings.

So what would be most helpful to me, Mr. Moffitt, is to hear from you on the clearly established federal law that you're relying on and how that federal law -- how the Michigan Court of Appeals erred in holding that, absent an objection, there was not a violation of the right to a public trial.

So with that, go ahead.

(A discussion was held off the record)

MR. MOFFITT: Your Honor, I'm asking if I may be able to address you from this counsel table. It would assist me greatly to be able have my client on these issues.

I've prepared endless oral argument on all the other issues. Just take a second, if I may.

(After a short delay,

the proceedings continued)

I would note, initially, Your Honor, that the Court of Appeals did -- actually just said that they would not address this -- I'm sorry.

They didn't say anything about the lack of objection, they just said that --

THE COURT: You know what? I'd rather have you there.

I don't want to have a -- it's not going to be possible for me to follow you with him whispering in

your ear every two seconds.

I certainly will allow you to take a break and consult with him, but I don't want this running dialogue with him talking in your ear.

MR. MOFFITT: Thank you, Your Honor.

THE COURT: Let me start with a clarification question.

What the Michigan Court of Appeals said on this issue is Pouncy raised in his supplemental or *pro se* brief, they reviewed it. It lacks merit.

So the first thing is, you would agree with me that the Michigan Court of Appeals addressed the merits of Mr. Pouncey's public trial claim?

MR. MOFFITT: Absolutely, Your Honor.

THE COURT: So you'd agree with me that their denial of that claim receives deference.

MR. MOFFITT: Yes, Your Honor.

THE COURT: There was not an objection to the closing of the courtroom in this case.

You'd agree with me on that point?

MR. MOFFITT: Yes, Your Honor.

THE COURT: So the question is the Michigan Court of Appeals held that there was no violation of the right to a public trial. It rejected his argument.

And what I'm asking you to focus your argument on, among other things -- you can feel free to argue whatever you want.

But tell me how that ruling on the facts of this case, without an objection, is contrary to clearly established federal law as set forth in the holdings of the decisions of the United States Supreme Court?

MR. MOFFITT: Well, specifically, Your Honor, the short answer is that *Presley* says that trial courts are required to consider alternatives to closure of the trial to the public even when they are not offered by the parties.

In this case, the trial court and I'm talking about the date of 1-26-06, did not consider any alternatives at all. I could be more specific.

THE COURT: Let me -- let me throw out a question, Mr. Moffitt.

The reason I'm inclined to say you may fairly invoke *Presley* is because *Presley*, the way I read it, did not establish a new rule; it simply was lock step with *Waller*.

Would you agree with that?

MR. MOFFITT: Absolutely.

THE COURT: In order -- you would agree with me that in order to invoke *Presley*, you have to

acknowledge *Presley* didn't even go one millimeter beyond *Waller*, because if it went one millimeter beyond, it is a new rule, right?

MR. MOFFITT: Put that way, I would say yes.

THE COURT: All right.

When I looked back at *Waller*, the, the Supreme Court tells us the issue they're deciding in Waller.

And this is the first line of the decision in *Waller* and I want to quote it because I think it's so important here.

It says:

> These cases require us to decide the extent to which a hearing on a motion to suppress evidence may be closed to the public over the objection of the defendant consistently with the 6th and 14th Amendment right to a public trial.

So I'm asking myself what did the Court hold in *Waller*. And in order to figure out what they held, I think it's fair to say they answered the question that they posed at the beginning. And the question that they posed for themselves to answer expressly incorporates an objection.

So, given that language from *Waller*, how can the Michigan Court of Appeals have acted contrary to *Waller*

if *Waller* expressly says that it's addressing the situation in which an objection to the closure is made?

MR. MOFFITT: I would have to take a quick look at my notes on that, Your Honor.

And I believe the answer will lie -- *Presley* addressed three different situations. I'm going to have to just quickly confer.

(A discussion was held off the record)

MR. MOFFITT: That's what I recall. There was -- in *Waller*, there was a companion case, *Cole versus Georgia*. And in that case, that attorney did not object.

THE COURT: He actually joined in the motion.

MR. MOFFITT: He did.

THE COURT: All right.

Is that your strongest argument that -- I understand your argument to be that what I should look at is what the Court did in *Waller* as opposed to what it said.

And your, your argument is if the -- if the rule is that a trial court is only obligated to act in the face of an objection, the Supreme Court would not have remanded the companion case, it would have simply said the c

ompanion has to lose.

MR. MOFFITT: I believe I did argue that, Your Honor.

THE COURT: Is there any other basis on which you want me to conclude that *Waller* applies in the absence of an objection?

MR. MOFFITT: I don't think so. I think the *Press-Enterprise* case and the -- I'm so sorry.

(A discussion was held off the record)

The *Gannett v DePasquale* case, Your Honor, it's also based on an original body of old law. But I think whether or not there was an objection is a state issue.

THE COURT: Let me think out loud for a moment.

When I first got this case, it seemed to me that exactly that that was the question; that the issue of an objection is only relevant as a procedural matter to present the question to state court.

And I wondered why, if the state court didn't invoke a procedural bar, why is the failure to object relevant at all? That was my first cut at the case.

MR. MOFFITT: And I was going to argue that today.

THE COURT: Then I took a step back and I said to myself there may be another way to conceptualize the

right that is at issue here, as a right that has to be affirmatively asserted in order to be exercised. Let me give you a comparison.

The Constitution guarantees a criminal defendant the right to compulsory process, but that right is only relevant if the defendant makes an affirmative assertion of the right.

For instance, if there was a criminal trial and the defendant chose not to put on a defense and didn't ask the Court to summon any witnesses for compulsory process, nobody would say that the right to compulsory process was violated, we would say it wasn't even implicated because it is in the nature of a right that is affirmatively asserted by the defendant in order to come into play.

So I asked myself is that the nature of the right to a public trial.

MR. MOFFITT: I don't think so.

THE COURT: Let me just finish, then I want -- because I want to give you the benefit of exactly what I'm thinking so that you have every opportunity to respond.

So I'm trying to understand. Is this that type of it right? If it is that type of right, then the objection is the functional equivalent of asserting the

right.

So I asked myself how does the United States Supreme Court speak about this right? And when you read the words that the Court uses, they, they refer -- the choice of words are interesting.

In *Waller*, what the Supreme Court says on Page 44 of the opinion, they say:

> This court has not recently considered the extent of the accused right under the Sixth Amendment to insist upon a public trial.

In other words, they're talking about the right with the choice of that word as perhaps one that the defendant affirmatively asserts like the right to compulsory process.

And they pick up on that language in *Presley*. They talk about -- I'm looking at *Presley* on page 213 of the opinion.

They say -- this is the Supreme Court speaking:

> The case now before the Court is brought under the Sixth Amendment for it is the accused who invoked his right to a public trial.
>
> And they -- then the Court goes on still now on page 213 and the Court says:

While the accused does have a right to insist that the *voir dire* of the jurors be public.

And the language that the Court used suggests to me that this is, at least arguably, at least arguably, a right that comes into play only when it is affirmatively asserted by a criminal defendant like the right to compulsory process.

I'd like your thoughts on that.

MR. MOFFITT: I'm not sure I'll be able to put my hands on the pertinent case law for a minute.

But as I recall, the Court regarded this -- the *Presley* court indicated that this was such an important right, that it would -- to be asserted regardless of whether anybody brings up the alternatives. And I'm guessing that if people don't bring up the alternatives, they aren't really expressing an objection either.

So I think it impliedly suggests that it's such an important right regardless of whether it's raised or not.

It also says that -- there's language discussing this right in the First Amendment context as in favor of the public and the press. And indicates that the right of the accused is as important as the public's and the press's.

It doesn't state that there is anywhere in, in those cases that there is a requirement that an objection be made. I don't think there's any U.S. Supreme Court case that makes that holding.

THE COURT: Let me, let me kind of continue my thought process with you because I want to give you a full chance to react to it.

My feeling as I sit here is that if I were sitting by designation on the Sixth Circuit and a direct appeal came up from a federal criminal case presenting this issue and I was called upon to decide what's the better reading of *Presley* and *Waller* is an objection required before a federal district judge can close a courtroom, I might well conclude, not sure, but I might well conclude that the better reading is that an objection is not required. That that seems to me at least a possibly fair reading.

But the context here is so different that in order to go for Mr. Pouncy in this setting, there has to be really no doubt that that is -- that *Presley* and Waller clearly establish that a judge must make these findings that *Waller* talks about before closing the courtroom even in the absence of an objection.

And my concern is there's at least some ambiguity as to whether the Supreme Court has clearly established

that rule.

And isn't that ambiguity in this setting fatal to the habeas claim, even if I were to agree with you that the better reading of the cases may be to the contrary?

MR. MOFFITT: I don't think so.

Where it remanded even *Cole's* case I think they made it clear that this rule was the case even when you agree with the closure of the courtroom.

I also think indicating that this rule is so important -- the language I'm referring to that indicates this rule is so important in that even in the absence of suggesting alternatives, it has to be obeyed. All but clearly says that even if no one says anything about how it's supposed to be done, it's still supposed to be done.

THE COURT: Only if there's an objection.

Let me tell you the further guidance I take from the Sixth Circuit.

One of the cases that was cited in the papers is the Sixth Circuit decision in *Johnson versus Sherry* 586 F. 3rd 439. Footnote eight of that decision in the majority decision starts off as follows:

> While defense counsel's objection triggers the trial court's duty to make factual findings under *Waller* -- and then the Court

goes on.

That, to me, phrases the issue exactly as it seems to me one could possibly read *Waller*.

It's the objection that's the trigger -- that triggers the trial court's duty to act and make the *Waller* findings. This was in *Johnson versus Sherry* the first time it came up.

The second time it came up, the Court revisited the issue. It's an unpublished decision 465 Federal Appendix 477.

It's, again, wrestling with the issue of with what do you do, what triggers the trial court's duty.

And in this unpublished case, the -- what the Sixth Circuit says is:

> When a defendant provides, quote, no notice of the claim, meaning no notice that he's claiming this public trial issue, it is not clearly established that a trial court's duty to make findings under *Waller* is triggered.

And to me, this, this creates a fair bit of doubt as to whether there's a clearly established rule by the Supreme Court that a trial court has this *Waller* duty to make the findings before closing the courtroom in the absence of an objection.

I understand your argument about *Cole's*, that's a very serious argument. I get it.

Is there anything else beyond *Cole's* that you would proffer against this reading of the cases?

MR. MOFFITT: I'd like to consult with my client. He has my materials there.

I do note the Sixth Circuit has a tendency to look inside in its own cases rather, sometimes, then I think to read what the U.S. Supreme Court has actually said. Having said so, I will return in a moment.

(A discussion was held off the record)

MR. MOFFITT: Your Honor, had I approached the argument the way I intended, I would have gone all through the fact that the state has stated that no objection is needed in it's lower --

THE COURT: What they stated is no objection is needed to raise the issue on appeal.

MR. MOFFITT: Right.

THE COURT: That's, that's the first way I was thinking about the question. That is an entirely separate question of whether the right comes into play at all absent an objection.

MR. MOFFITT: It is. I just wanted to make sure I was addressing that in the context you're aware that I was addressing it is in.

The case law I was reaching for and saying I wanted to pull from the side reads that:

> The conclusion of that the trial courts are required to consider alternatives to closure even where they're not offered by the parties is clear, not only from this Court's precedence, but also from the premise that the process of jury selection is, itself, a matter of importance, not simply to the adversaries but to the criminal justice system.

THE COURT: Where are you reading?

MR. MOFFITT: I'm sorry. *Presley* 13724.

THE COURT: I get all that. I read that case probably 15 times.

MR. MOFFITT: I'm sure.

THE COURT: But that case is in the context of an objection.

MR. MOFFITT: It says:

> The public has a right to be present whether or not any party has asserted the right.

THE COURT: That's the public's right.

MR. MOFFITT: Well, they equate the public's right under the First Amendment right to public trial with the Sixth Amendment right to public trial saying

they're just as important as to one another.

THE COURT: They're saying the scope of the two rights can be the same, I understand that.

And they're saying the public's right isn't in any way diminished, even if both of the parties would want it closed. I understand that.

But with respect to whether there's a violation of the defendant's right --

MR. MOFFITT: It does continue to say that in *Press-Enterprise*:

> Neither the defendant nor the prosecution requested an open courtroom. Both specifically argued in favor of keeping it closed.
>
> The court found it was error to close the courtroom.

I believe that says it's clear.

THE COURT: So your point is your -- with respect to clearly established federal law one, *Cole's*.

MR. MOFFITT: Yes.

THE COURT: Two, this language you point out, and properly so, that the Court has often gone back and forth between the First Amendment's public right of access and the defendant's right to a public trial.

MR. MOFFITT: Yes, Your Honor.

THE COURT: And you're suggesting that since no objection by the defendant is necessary to trigger the public's right, you want me to say the rights are co-extensive so the reasoning ought to carry over.

MR. MOFFITT: That's what *Presley* appears to say to me at 130 Supreme Court 724 hyphen 725 at headnote six and seven, Your Honor.

THE COURT: Okay. Thank you.

MR. MOFFITT: Certainly.

THE COURT: I didn't mean to cut you off. I have a bad habit of cutting people off. I want you to tell me anything else you want to tell me.

Let me get your reaction to one other case. The Second Circuit's decision in *Downs versus Lape* case, another case cited by the Attorney General.

And that's a case where the parties were fighting over New York's contemporaneous objection rule.

And the defendant had not raised an objection to the closure of the courtroom.

And the matter comes up to the Second Circuit and the Second Circuit says -- ultimately holds that's an adequate ground, that's a procedural bar.

The last argument that is the petitioner now makes to the Second Circuit is it doesn't make any sense to

apply a contemporaneous objection rule to a Sixth Amendment public trial claim because you don't need to object.

And the trial court, even absent an objection, is duty-bound under the Sixth Amendment not to close the courtroom without going through the *Waller* inquiry and making the *Waller* findings.

So petitioner argues to the Second Circuit the contemporaneous objection rule makes no sense in the context of a public trial claim.

And the Second Circuit goes through its analysis. And, and the petitioner in that case was relying on *Presley* and *Waller*.

And the Second Circuit says -- it's on page -- I'm not sure, I'm not sure I can see the page number here. It's just before the conclusion section.

The Second Circuit says:

> As both *Presley* and *Waller* involved a trial court's response to a registered objection, neither decision requires courts to justify or consider alternatives to closure when, as the appellate division reasonably found here, no objection is made.

Isn't --

MR. MOFFITT: That's what they say.

THE COURT: You may say the Second Circuit is wrong, but isn't, isn't -- it at least seems to me that two judges on the United States Court of Appeals for the Second Circuit would say *Presley* and *Waller* don't clearly establish that a trial court has a duty to make findings and a duty to refrain from closing the courtroom unless there's an objection.

MR. MOFFITT: I do think they're mistaken. I do think they overlook the *Cole* argument and that's what the Attorney General has asserted.

I wish to respectfully caution the Court at taking some of the arguments that the respondent has offered at face value as I've pointed out in some extensive pleadings.

THE COURT: Is the *Cole* -- I understand the argument in *Cole* you make, it's a very serious argument; one I take seriously. I'm trying to understand how to fit it in.

Is that enough to be a clearly established federal law? I understand they remanded, I understand it's hard to reconcile their remanding a case in which somebody doesn't object with their language saying they were only dealing with an objection.

But is that act of remanding enough to be a clearly established statement or holding of law by the United States Supreme Court?

MR. MOFFITT: I would like to think it is, but given the language in *Presley* I just read, I think that makes it clear. I think that seals it.

It said that the Court, nonetheless, found it error to close the courtroom even -- I don't know what could be clearer then that on this point in my mind.

I may not plum the deps of the issue fully as Your Honor has but that to me seems clear.

THE COURT: I don't want to restrict your argument.

Is there anything else on the clearly established issue you want to point out?

MR. MOFFITT: I think not, Your Honor, unless it were to rebut the authorities that the Attorney General has offered *Singer*, *Levine*.

I don't believe -- I believe I have put in writing that those do not offer the clearly established law.

I think I've indicated that they neglect to discuss the *Olena* case and that the cases that they've cited have only been cited seven times since 1991 and none of those for the proposition at issue here.

I don't think we can -- I don't think the attorney -- the respondent's offering on clearly established federal law makes any argument that should invoke the Court's attention for very long.

THE COURT: Okay. I told you my thinking on some the other matters. I don't want to restrict you're -- you're certainly free to address those.

MR. MOFFITT: Thank you, Your Honor.

THE COURT: But when I tell you I don't think you have a retroactivity issue, it seems to me you can only change my mind for the worse. So if I were you, I wouldn't want to talk about that. But if you do, go ahead.

MR. MOFFITT: Your Honor, I did want to note that we had proposed to file a motion for actual innocence. I have prepared that motion. I have sent it to the Court requesting leave to be able to file it.

I think it's an important consideration in this argument to know that we are actually asserting an actual innocence situation.

THE COURT: Isn't actual innocence relevant only to overcoming a procedural default?

Haven't the Supreme Court said 10 times the question isn't whether a habeas petitioner's actually innocent. As crazy as that sounds, that's not the

question.

MR. MOFFITT: Yes. I wish it to be stated because we didn't get to file it. I don't think there's any procedural bars to our addressing this claim. I think, you know, that's clear from the trial court addressing the matter on the merits.

I think it's clear from the Supreme Court waiver that the Solicitor General signed in this matter. I think it's clear that -- you know what it's clear from.

THE COURT: I agree with you there's no procedural bar.

With respect to the actual innocence motion, let me -- let me ask you. How is that relevant to this summary judgment issue I'm looking at right now?

MR. MOFFITT: Well, I wanted it to be known that we were making that claim.

I wanted it to be in support of there being no procedural -- that should overcome any procedural bars.

I wanted it to be known that we were making it, that we didn't get to file it.

And that if, in the event that the Court had ruled for us, I would have argued for bond and noted that we were making an actual innocence argument, that we had requested a polygraph, that we haven't been allowed to take one in the prison yet. I thought that was

pertinent to the issue of bond, also.

THE COURT: Bond? You're getting a little ahead of yourself talking about bond.

MR. MOFFITT: We've tried to be comprehensive in our written pleadings covering these matters, Your Honor.

THE COURT: You have been nothing but comprehensive.

MR. MOFFITT: Thank you, Your Honor. There's is something that I wanted to address with Your Honor; and that was that we believe that there's been a confession of error on the motion hearings issue.

In the -- all of the respondent's pleadings have addressed the *voir dire* context of our *Presley* claim. None of them have ever addressed or used the words "motion hearings."

Even Your Honor directed them to file -- to answer a question -- the questions, the re-order regarding both *voir dire* and motion hearings and they did not address the motion hearings aspect of it in their answering of that question. I think that's very significant.

THE COURT: Just so I understand, also at the motion hearings there was no objection to the closure?

MR. MOFFITT: That's correct.

In their answer in opposition to petitioner's writ

of *habeas corpus* filed 5-19-14, the first paragraph of page 56 to the last paragraph of page 57, they addressed only *voir dire*.

Then in their supplemental answer in opposition to *habeas corpus* filed February 3, 2015, at page seven to eight, they did not respond to the motion hearings aspect of the closure of the courtroom under the *Presley* claim.

And in their second supplemental answer, that's something I want to address because I believe that pleading is neither supplemental nor an answer.

They said that they did not address the motion hearing even though Your Honor specifically directed them to answer regarding motion hearing.

We would respectfully submit that when you make a deliberate omission to respond to a factual allegation of a *habeas corpus* petition, you admit that those factual allegations.

When you fail to offer legal argument or response, you are foreclosed or there's a confession of error as to that specific claim.

I think that having failed to say a single word about the closure of the courtroom in the motion hearing circumstance and there were several motions heard on 1-26-04.

There was a 404(b) motion that Mr. Pouncy was forced to answer, 18 years old, as his own attorney.

There was a motion hearings on an alleged tape recording of Mr. Pouncy that he was forced to defend without counsel. They haven't said a word about this. And I think they have confessed on this topic and I think a writ can issue summarily on that alone.

If Your Honor wished to make that summary ruling, we would accept it and ask to stay the rest, provided he could be afforded bond on appeal.

There is nothing in anything the Attorney General has filed that addresses the motion hearing context. And I have a plethora of law that basically says when you do that you lose.

We have not addressed specifically -- I couldn't fit into the 10 page brief, the arguments regarding judicial estoppel. I'm sure Your Honor is familiar with judicial estoppel.

I can go through --

THE COURT: What points specifically do you want to estop the state from making?

MR. MOFFITT: Given that retroactivity is gone, regarding whether an objection is needed or not.

THE COURT: Again, this gets back to the distinction between whether an objection is needed to

raise it on appeal.

And the state says none was needed in that context, versus the separate argument about whether substantively the right is asserted at all or comes into play without an objection or an assertion. And I don't think they're estopped from making the latter argument. Their brief uses the word that is picked up in the cases.

You made a very fair point that it doesn't -- you don't talk about waiver when there's a lack of an objection. The courts have clarified that.

The State, in its brief, talks about under federal law the right to an open trial is waived if there's not an objection. I don't think that's the right way to put it.

What I understand them to be saying which is the way I said it which's under federal law the right doesn't come into play unless affirmatively asserted and the assertion is through an objection. I think that they have been saying all along the tough argument that I put to you.

MR. MOFFITT: I'm not sure they make the distinction as elegantly as Your Honor has.

Your Honor, I will simply say that they've said nothing about motion hearings in any of their pleadings and it will take some assistance from the Court to try

and say that they really do have a response about that.

And in response to that, I would say that Your Honor asked them in a specific question to specifically address motion hearing and they still didn't say a word about it.

THE COURT: I understand this argument as a wholly technical matter, but should I seriously say the State has obtained a conviction and a sentence of Mr. Pouncy for 40 or 60 years or whatever it is and honestly believe they've confessed error?

These guys are here because they think there's absolutely no merit to this position. And they may not have used the words "motion hearing" but they're going to be screaming bloody murder that there was no trial right violation, open trial right, at any phase in this proceeding.

Isn't that what they're going to tell me?

MR. MOFFITT: I guess, Your Honor, but I don't -- I'm not putting much credence in what they're telling you.

These are the same people that said that, you know, *Presley* was a new rule. I mean they'll tell this Court anything they think this Court will consider.

THE COURT: Let me response to that, I believe it's important to do that on the record.

Before I came here, I litigated against these folks and this office for the better part of 20 years and while there were plenty of cases in which I thought they were dead wrong, I mean completely missed the boat on the merits, they were some of the finest and most upstanding people I litigated against.

There is -- does seem to be some difference in the position they've taken and I'm going to ask them about that. But I don't question the -- your absolute firm commitment and honest belief in your -- everything you've told me.

And I don't for one second question the sincerity and ethics of the gentlemen that are arguing against you.

While I take your arguments with the absolute utmost seriousness and I've been wrestling with them, thinking of them, I want this record be clear that I don't buy for a second the idea that these folks are willing to say anything or do anything or cheat or bend the rules to keep Mr. Pouncy in custody.

MR. MOFFITT: I look forward to having the same experience as Your Honor in these matters.

Can I briefly confer with my client, Your Honor?

THE COURT: Absolutely.

(Whereupon a discussion was held of the record)

MR. MOFFITT: You did not wish the details of estoppel; is that argument reasonably clear their positional changes? That they're not entitled to a positional change from --

THE COURT: You are telling me they have changed their position. I understand your point that the position about whether *Presley* is a new rule seems to be a change.

But as to the issue of a waiver, my view is that hasn't changed. You can certainly argue whatever you want to say on that.

MR. MOFFITT: All right. Give me a moment. Thank you, Your Honor.

(A discussion was held off the record)

THE COURT: Mr. Moffitt, let's do this. I don't want to keep taking time here.

MR. MOFFITT: I'm sorry.

THE COURT: How about if you consult quietly with Mr. Pouncy while I hear from Mr. Pallas, then I'll give you full opportunity so you don't have to rush through.

He can slowly, carefully, tell you what he wants you to look at that way it might be a benefit to you.

Does that sound fair to you?

MR. MOFFITT: I'm very grateful.

THE COURT: When you come back up, you won't be limited to simply what your -- what we were talking about here.

If there's any new points you want to argue I don't mean to cut you off, I want to move this issue.

MR. MOFFITT: It's most gracious.

THE COURT: Mr. Pallas.

MR. PALLAS: Good afternoon, again, Your Honor. A lot's been said here today, so I think maybe I'll start out by addressing maybe questions that you may have directly, some of the things of most concern to you.

THE COURT: Sure. How's do you guys -- how can an objection be required in light of what the Supreme Court did in the *Cole's* companion case?

That guy not only didn't object, he joined in the prosecution's motion to close the courtroom.

And if the rule is that an objection is required to affirmatively assert the right, as I question whether it is, then *Cole's* couldn't possibly have been entitled to a remand, it should have been a footnote. Of course, *Cole's* loses because he didn't object.

How do you square what happened in *Cole's* with the idea that it is not clearly established that even absent an objection, a Court needs to make the findings before closing the courtroom.

MR. PALLAS: Well, Your Honor, I believe the way to address that is to think about what clearly established federal law means.

That means, obviously, Supreme Court law, but just not any statement by the Supreme Court. It has to be precedent it can't be holdings, it can't be *dicta*. It can't be some sort of as an aside discussion in the opinion; it has to be an actual holding of the United States Supreme Court.

THE COURT: Isn't there a holding with respect to *Cole's* holding we vacate his conviction and we remand for further consideration? Isn't that a holding?

MR. PALLAS: No. I think that's a ruling, but I don't think it's a holding in terms of how you look at precedent.

I would put that more in the category of *dicta* or non-precedential language. Certainly no one is citing the case for that proposition.

So I think the United States Supreme Court has been extremely clear and I think of late even the decision of *Woods versus Donald* that came out fairly recently in

March --

THE COURT: Can you hear him? Maybe turn that microphone around. Sorry. Go ahead.

MR. PALLAS: Thank you, Your Honor.

I was citing to the case of *Woods versus Donald* which is ironically a case that came out of our office; it was a habeas grant out of the Sixth Circuit.

The cite on that case is 135 Supreme Court 1372. And, specifically, I'd like to talk about page 1377 of that opinion.

And what the Court -- there was -- it was about a chronic violation. The whole issue had to do with whether or not chronic applied in a particular situation.

And what the Supreme Court said was --

THE COURT: This is one where the fellow was absent from court for a short period of time?

MR. PALLAS: For, approximately, 10 minutes during testimony. That was -- it was a multiple defendant trial.

THE COURT: I was having lunch with Judge Cohn the day the Supreme Court issued that decision. It was his grant of the writ, so I'm pretty well aware of it.

And what the Court -- your point is that the Court said that we haven't clearly spoken to this issue.

MR. PALLAS: Exactly.

I think what the Supreme Court did in *Woods* was to say it has to be something that's clearly been addressed by us in the past. There -- I mean you would almost think as sort of a thought, well, isn't trial a critical stage.

But there the Supreme Court said, well, we've never addressed whether the rule announced in Chronic (phonetically) applies to testimony regarding a co-defendant's actions.

So what *Woods* illustrates is really the term clearly establish federal law as determined by the Supreme Court. That really means something, that really has teeth to it.

I think that's what really guides the entire analysis here, because we are on federal habeas, as you indicated.

And I think one of the points I'd like to make is that there are really two classes of Supreme Court cases.

And I think as some of your comments may be alluded to when Mr. Moffitt was up here is, you have the *Presley, Waller* line of cases that talk about a situation which clearly implies that there's, there's an objection. They're talking about an objection.

Then, on the other hand, you have another line of cases the *Perez*, *Singer*, *Levine* line of cases that suggest where there isn't an objection, there's a waiver of that particular right.

THE COURT: But aren't those cases, that earlier line, isn't Mr. Moffitt's point about the discussion in the earlier cases a fair one?

That the idea that no objection is a waiver seems to me the Supreme Court has said although we may have used that wording in the past, we really don't mean that. That no objection is forfeiture, it's not waiver.

So isn't -- forgetting the holdings of those cases because in none of those cases was the holding applying to the facts that we're facing here, it's just language in those cases.

But isn't the language in those cases hasn't that been superseded by the *Oleno* decision and the failure to object and a waiver?

MR. PALLAS: I think another way to look at it.

I think another way to look at it would be, Your Honor, to think about, again, the phrase clearly established federal law.

The Supreme Court has never really directly addressed a situation where you have an un-objected to,

you know, public trial closure issue like this and addressed it head on. That hasn't happened.

THE COURT: What about -- what about this line from *Presley*. When Mr. Moffitt was up there, I gave him an opportunity to comment on the portions of the decision that arguably undercut him.

The Supreme Court in *Presley* said on page 216 of the United States Reporter:

> Trial court's are obligated to take every reasonable measure to accommodate public attendance in criminal trials.

That was in the context of a case in which there was an objection made, but that's an awfully broad statement. That isn't tied to when the defendant objects. That kind of language says trial judges, wake up. You can't be closing the courtroom no matter what any of the participants do. And in case you're missing it, we're going to make it crystal clear to you.

That's an awfully strong language in a Supreme Court decision.

MR. PALLAS: It's strong language, but I think it's reasonable certainly to read *Presley* in that way, but it's also reasonable to read it that there has to be an objection.

And, again, talking in terms of federal habeas, it's all about the reasonableness of the state court decision and whether or not a fair-minded jurist could possibly disagree on what the Supreme Court meant.

Certainly, there's probably numerous different ways to read *Presley* and interpret it. Like you said, you use the word broad. The broader the rule is, the more leeway is then afforded to the state court when it's assessing that federal constitutional right.

THE COURT: The more general the rule.

I didn't mean broad in the sense of generality, I meant broad in the sense of arguably the Supreme Court saying there isn't an exception to this rule that you're supposed to consider alternatives to closing the courtroom in every case.

MR. PALLAS: Right.

Like I said, I really think this comes down to reasonableness and whether or not there's any possible room for fair minded disagreement that the, that the Supreme Court -- when the Court of Appeals denied said this can claim is without merit, whether that is reasonable interpretation. Again, that is assuming that *Presley* would apply in this situation.

And I understand one of your concerns was whether or not, in fact, is whether there's a question of

retroactivity here and whether or not we waived that in our initial answer.

THE COURT: I don't think you waived it. I want to hear from you on it.

But my view is, as a substantive matter, whatever you call it, I don't think there's a retroactive problem here. Let me share with you my thinking, give you a chance to tell me where I'm wrong.

The shorthand way of talking about retroactivity is to say a habeas petitioner can't point to decisions that come down after his conviction becomes final.

But it's not a chronological trigger, it's not the date of a United States Supreme Court decision, it's whether the decision announces a new rule or not.

Presley court I think went to great lengths to say, my words not theirs, but awfully close to theirs, we're not announcing a new rule here. Our prior precedence made this crystal clear.

That kind of decision, if it's not announcing a new rule and simply confirming what the prior cases held, it isn't -- to rely on that decision, to rely on *Presley* is not to rely on the new rule in violation of the retroactivity rule, it's to say the Supreme Court has clarified what I've been arguing all along, that the law that existed prior to my conviction becoming final

is exactly what I say it was.

MR. PALLAS: Well, again -- I hate to sound like I'm constantly repeating myself, the Supreme Court has not held that specifically as in terms of the question of its retroactivity; *Presley's* retroactivity.

So, again, there is room for fair minded disagreement about whether or not, you know, it is a new rule of law or has aspects of a new rule of law.

THE COURT: If *Presley* had been a habeas case and the Supreme Court held what it held, we would know by definition that it wasn't applying a new rule because in habeas it can't.

MR. PALLAS: That's correct.

THE COURT: And so if *Presley* was a habeas case we'd say of course the petitioner can invoke it even though it was decided after his conviction became final because it's not announcing a new rule.

Even the Supreme Court hasn't said squarely held *Presley* applies retroactively, if I conclude it's not a new rule, I can, I can apply it retroactively, right? You don't have to have a Supreme Court to decision to say it.

MR. PALLAS: Quite frankly, we're not afraid of *Presley* because *Presley* stands for the fact that there has to be an objection in order for the right

that's discussed in *Presley* to even apply in this situation.

Our waiver argument admittedly may not be the strongest -- excuse me. Our retroactivity may not be the strongest.

If that is rejected, our position is it's a requirement that to the *Presley* requirement only comes into play when there actually is an objection. And that is clear from the discussion of the actual case, the actual precedent that's established by *Presley*.

So even if we get beyond this whole issue of whether or not *Presley* would apply to this case, we're not afraid of *Presley*. We think under *Presley* we win as well.

THE COURT: Just as an aside, how do you reconcile the point that it appears that in a prior case your office took the position that *Presley* was not a new rule and it functioned in exactly the way that I hypothesized it, simply clarifying an old rule?

MR. PALLAS: We'd be wrong, I'll be the first to admit that.

We try our best to continually keep all of our positions consistent. We learn new things every day in our line of work and realized new arguments sometimes that we didn't have before us at the time we made our

initial assertion.

I think the quote from Justice Frankfurter applies here is from one of his cases where he says wisdom too often never comes, so one ought not to reject it because it comes late.

I'll be the first to admit that was a mistake. We try not to make those mistakes very often. I supervise the habeas section and do our best to make sure we're all on the same page. But I have to admit I learn something new every day in the federal habeas realm.

As you know very well, it's a very active area of the law and sometimes decisions come out that sort of put a whole new wrinkle.

One year it might be a decision that states from the Michigan Court of Appeals for lack of merit and the grounds presented was a merits adjudication.

The next year we have *Richter* and *Cullen versus* Pinholster and *Benworth versus Bell* out of the Sixth Circuit that say, yes, isn't presumed to be a merit adjudication.

I'm not saying there was an intervening case, but it was a mistake on our part and we would like to retract that as much as that's possible to do.

I mean certainly it hasn't prejudiced counsel in the sense he's been able to respond to our retroactivity

argument.

So I think it would be certainly unfair if we, at the last minute, did that or did it on -- let's say you were to grant habeas relief and somebody came up with that argument, then it might be unfair to the Court, unfair to the petitioner.

But we're sort of raising it in the course of this very interesting and somewhat difficult legal issue that I think we've all been struggling with for sometime.

So it was a mistake, we apologize to counsel, we apologize to the Court. But it's a mistake we don't often make and, hopefully, doesn't happen again, but likely will at some point in the future. We're not perfect.

THE COURT: What else -- is there anything else you'd like to touch on while you have the microphone, Mr. Pallas?

MR. PALLAS: At this juncture, unless you have any -- I know -- I don't think I need to emphasize the fact why are asserting procedural default.

The state court didn't default. We can't even rely on procedural default. We believe it was a waiver rather than procedural default.

I'll stand on what our answer said in that respect unless you have any questions.

I'm satisfied that our pleadings asserts our position fairly and accurately and I stand by that.

I'm here to answer any questions you may have regarding this case.

THE COURT: I don't think I have any other questions at this time.

MR. PALLAS: I just say, again, this is summary judgment which is a very rare thing for a petitioner to ask for in a federal habeas case.

If one thing is evident from the discussion here today, there isn't a clear, legal right or a clear, legal issue or question of fact that would necessitate summary judgment.

I certainly think this is something that is appropriate to go to Your Honor and to assess it and then make a decision in its own time rather than approach this through a summary judgment motion.

And with that Your Honor, I have nothing further.

THE COURT: Okay. Thank you.

MR. PALLAS: Thank you.

THE COURT: Mr. Moffitt.

MR. MOFFITT: Thank you, Your Honor.

Your Honor, I think we should note that there was not a specific Sixth Amendment objection made in *Presley v Georgia*.

That an objection was simply made to the exclusion of the public from the courtroom. That's *Presley* 130 Supreme Court at 722. But it was without ever asserting a Sixth Amendment objection.

The ambiguous statement that he was objecting to the exclusion of the public from the courtroom does not indicate precisely what basis the objection was made on First Amendment, Fifth Amendment, Sixth Amendment, Fourteenth Amendment. We may never know.

THE COURT: Are you reading from something?

MR. MOFFITT: I am reading.

THE COURT: From a case?

MR. MOFFITT: I'm reading from a brief I wrote that I wasn't allowed to file. I had to condense it down to 10 pages, so I didn't get this part in.

But if Your Honor would indulge me --

THE COURT: I'll indulge you. Go ahead.

MR. MOFFITT: I'm very grateful.

Despite the fact that the objection was not specific, the Supreme Court considered the claim of error on a Sixth Amendment basis.

So despite the fact that an objection without a reason -- despite the fact that objection without reason does not preserve an issue for appeal.

People versus Ackerman 957 Mich. App. 434 2003.

THE COURT: *Presley* came from Georgia.

MR. MOFFITT: Yes.

THE COURT: How do I know that that objection under Georgia law was not sufficient to raise the issue?

I understand what the *People versus Ackerman* may say. Obviously, the sufficiency of that objection is, is established because the Court treated it as a preserved -- the Supreme Court treated it as if the fellow had objected on Sixth Amendment grounds.

MR. MOFFITT: But he didn't necessarily.

So the point is they considered it regardless of its lack of specificity.

And in the *United States versus Villa Gomez* 708 F. Supp. 2nd 1105. This is the 2010.

They acknowledge that the Supreme Court displayed the willingness to consider a Sixth Amendment claim in *Presley v Georgia*, despite the lack of a specific Supreme -- the lack of a specific Sixth Amendment-based objection.

The Court said in *Presley* two defendants asserted that the Court's exclusion of the sole member of the public presence at beginning of jury selection, the defendant's

uncle was -- the exclusion of the pubic from the courtroom, but the defendant did not cite a Sixth Amendment right to a public trial. Presley 130 Supreme Court 722.

THE COURT: Can you help me out.

How is it that we know the exact words of objection from *Presley*?

MR. MOFFITT: I think we don't. I might have the oral argument transcript.

I believe they said in the case, Your Honor, what the objection was --

THE COURT: I see the quote.

MR. MOFFITT: You do?

THE COURT: A portion the Supreme Court quotes a portion of the objection.

MR. MOFFITT: Nonetheless --

Nevertheless, the Court summarily granted relief for a violation of the defendant's Sixth Amendment right to a public trial.

So I'm addressing that to whether this is clearly established federal law.

I did want to say that the Second Circuit case, I felt that this Court should not consider cases other than the U.S. Supreme Court cases and what it itself says, the opinion of the Second Circuit about what they

think it said notwithstanding.

I also have cited a case, Your Honor, *Matthews versus Parker*, for the proposition that these lower court cases can't be considered in trying to discern what the Supreme Court itself has said. And I'm standing on my prior arguments with respect to what the Supreme Court did say.

I would also note that the --

THE COURT: Isn't the rule --

MR. MOFFITT: -- respondent did not raise this argument.

THE COURT: Isn't the rule about lower court cases that appellate cases can't lay down a rule that counts as clearly established federal law, but certainly I can look at appellate court cases to see whether the Courts of Appeals think that a particular rule has been clearly established by the Supreme Court or not, can't I?

MR. MOFFITT: I think Your Honor is entitled to look at any authority it does wish, but I am also noting that the respondent did not raise this particular argument specifically.

THE COURT: Which argument? The one that I keep making?

MR. MOFFITT: Yes, Your Honor.

THE COURT: Okay. Go ahead.

MR. MOFFITT: I would also respectfully submit that this Court cannot substitute or offer arguments on behalf of the respondent; that I submit the respondent has not specifically raised itself, though it is, of course, entitled to consider the law as a whole and to take what it regards as persuasive from where ever it regards it. I think that needs to be taken into account Your Honor.

I wanted to note -- I'm sorry.

(A discussion was held off the record)

MR. MOFFITT: Your Honor, I also wanted to note under the local court rules certain motions remain unopposed today.

For example, the motion for grant of bond while this matter is being considered or if Your Honor should rule in our favor. No responses were filed to that.

I can offer a summary of a great many issues, Your Honor, many of which I didn't realize would be suggested not to be extensively briefed in oral argument by us today.

And is there any particular area that Your Honor wishes additional clarification or case law on?

I would note, Your Honor, that -- and I don't wish to try the Court's patience with this, but I've heard today an apology offered they we were wrong.

Your Honor, I find it difficult to simply dismiss that issue on this basis. If they say to a previous federal court that *Presley* is old law, I think it's very difficult for them to stand here today, though I was surprised how it was done, to say that they were wrong.

THE COURT: Look. I think *Presley* applies to this case. So whether they were -- had your motives or not, I'm with you on that issue.

(A discussion was held off the record)

MR. MOFFITT: Your Honor, I'm advised to bring forth the precedent of *Victor versus Nebraska* where the Supreme Court said they would still address a claim even though contemporaneous objection was not met.

This is in support of our allegation that the clearly established law of *Presley* is as we have argued it.

THE COURT: You asked, Mr. Moffitt, what can you talk about. I have indicated in orders I have entered I didn't want anymore written filings; and let me talk little bit about that.

MR. MOFFITT: I have an extensive brief that covers absolutely everything that is ready to go you

Your Honor if Your Honor wished it.

THE COURT: The filings you were filing were saying the same thing in ten different ways in ten different contexts.

You were making the argument that I take extremely seriously and you've presented quite effectively and it was just being packaged in different labels; like the motion to enforce the waiver, the motion to enforce the estoppel, the motion to stop them from arguing. After you got past the title, it was -- it was the same argument that you're presenting very effectively.

And those additional filings were not advancing the ball, at least in my consideration of a very serious claim that you're pressing here.

But since we're here today, I want to give you an opportunity to orally make any additional points that you want me to consider as I'm wrestling with this trial issue.

MR. MOFFITT: I did want, Your Honor, to consider that if Your Honor regarded what was apologized for as a form of fraud on the Court.

THE COURT: I, I don't want to hear anything about fraud.

MR. MOFFITT: You are permitted to strike their pleadings.

THE COURT: I'm not striking anything. But on the merits, I'm happy to hear them.

MR. MOFFITT: I would like Your Honor to seriously consider what I said was a confession of error when they failed to address the motion aspect.

They've only addressed *the voir dire* aspect. There's no motion of that anywhere in the pleadings. I think that's a significant omission.

There's considerable case law that I could cite at length regarding when you don't address such a serious allegation, a factual allegation as that, a legal argument as that. The cases are very clear that you concede that point.

I think that would allow the Court to go directly to writ here on that issue. We would respectfully request Your Honor doing so.

Let me ask my client if he has anything additional that he wishes me to bring.

THE COURT: Let's do this.

I'm going to take a ten minute break. He can stay here, so we're not going to waste any time.

Because my point is, I want to give you a full opportune to consult with him and then share with me in this forum today any additional points.

Oral argument on these petitions is not usual, but I know you have a lot to say. You've done a ton of work on this case.

And this is your chance to identify for me an additional case you want me to read, any issue I've missed, to point out any errors in my thinking.

But in order for you -- I can tell Mr. Pouncy's playing an active role in this. I want you to have some quiet time to consult with him so you can make the most.

And then when you come back, I'm not even going to put a clock on you. You talk until you feel you've done telling me everything you want to tell me.

MR. MOFFITT: I'm very grateful. Mr. Pouncy is a most wonderfully precocious individual. I'm grateful to be able to make sure he is satisfied that I have offered everything and I'm grateful that Your Honor has offered us this opportunity to bring it. I can't say how grateful we are for that, Your Honor.

THE COURT: Okay. Happy to do it.

We'll take a 10 minute recess and I will look forward from hearing from you when I return.

(Whereupon court was in recess at 3:12 p.m.)

(Whereupon court was back in session at 3:26 p.m.)

THE COURT: Please be seated.

Mr. Moffitt, the floor is yours again.

MR. MOFFITT: Thank you, Your Honor.

Your Honor, I recognize I'm addressing this in a somewhat fragmented fashion, but, again, I'm grateful the Court has indicated where and where not to discuss.

THE COURT: I want you to feel free to discuss anything you want to discuss.

What I was saying what you don't need to discuss, that's the stuff I'm leaning your way on anyway.

MR. MOFFITT: Let me amend what I just said by what you just said.

THE COURT: Go ahead.

MR. MOFFITT: Failure to object is not -- has nothing to do with clearly established federal law, it's state law we would submit.

There's no Supreme Court -- well, let me give you two cases on that first. *Egg*, e-g-g v Yukens 485 F.3d 364 at 369.

THE COURT: The bite mark case.

MR. MOFFITT: Sixth Circuit 2007.

Michigan's contemporaneous objection rules a valid state procedural rule.

Salem versus Yukens 414 F. Supp 2d. 687 at 694 Eastern District of Michigan 2006.

A default under state law may occur if petitioner fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, that is, to make a contemporaneous objection.

I believe that was a public trial case.

Your Honor, there's no Supreme Court case that says an objection is needed to preserve the issue.

Just because *Presley* court addressed its issues in the light of an objection doesn't mean that the objection it addressed was necessary under those circumstances.

THE COURT: Isn't it, you know, you, you read tons of Supreme Court cases as do I. And in a lot of the case says when the Court frames the issue, it doesn't incorporate the notion of an objection.

I'm just making this up. For instance, in the *Batson* case, when they're talking about excluding folks or when they're talking about Fourth Amendment issues, whatever it is, it's not the usual practice for the Court to frame the question in terms of an objection. Isn't that a unique feature of *Waller*?

MR. MOFFITT: I can only take *Waller* and *Presley* on their face, Your Honor.

I'm not sure I can read in more than what I'm suggesting the Court interpret that as an objection is not necessary.

There was a case *Ylst* y-l-s-t versus *Nunnemaker*, 501 United States 797 at 801 that said -- 1991 case.

> If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise be available. And *Victor v Nebraska* on state 511 United States 1 at 1994.
>
> On state post-conviction review, the Nebraska Supreme Court rejected Victor's contention that the instruction violated the due process clause.
>
> Because the last state court which review could be considered could be had considered Victor's constitutional claim on the merits is properly presented for our review despite Victor's failure to object to the instruction at trial or raise the issue on direct appeal.

Gram v Collins, it's cited 506 United States 461 at 512. It's a 1993 case.

The habeas petitioner didn't seek mitigating circumstances instructions he claims was required to issue before us because Texas Court of Criminal Appeals appears to have addressed petitioner's challenges on the merit and in a state post-conviction proceeding.

Under the circumstances, when the state courts don't rely on independent state grounds and, instead, reach the merits, the federal question is properly before us.

Again, it demonstrates, like *Presley*, like what I offered about the interpretation of *Presley*, that clearly established federal law does not here require a discussion of whether or not there was an objection or a failure to object.

That was a long, circuitous way of backing into it, but I hope it is pertinent to what the Court had asked us earlier.

It's also consistent with the way the U.S. Supreme Court handled the *Cole versus Georgia* case, I would offer.

In *Johnson versus Sherry*, which was cited by the respondent, that case -- the defendant lawyer acquiesced to the closure. I think it was distinguishable for the

purpose of which they offered it.

I think I think there is a -- a silhouette or a outline of this case, Your Honor, that if discussed in the full on the particular handling of this issue would, I think, militate towards adopting the petitioner's position on the issues that have been discussed.

I think we have made clear points on waiver, on retroactivity, on estoppel, on the state court not barring consideration and taking it up fully on its merits.

I think it's very clear that the Attorney General really does think this is old law whatever what they're saying today. I guess in this situation, I guess they would have to say today since they said what they said what they said in Oregon they said what they said here today.

And when I say to look at the silhouette, the profile of this case, remember that I think that first came up not in the initial answer, not in the supplemental answer, but in the second supplemental.

So I think it was the second supplemental answer and that was filed in response to Your Honor's asking a question requesting a brief.

It says it's a second supplemental answer, but I don't think it's supplemental, I think it's an -- like

an amended answer.

They say right in their brief second supplemental answer. They're asking for the opportunity to amend.

Well, they didn't make a motion to amend their answer, they just asked for the opportunity to do so, but that hasn't been formally undertaken here today.

It's not supplemental because it has to be there in the first place to be supplemental. Its amended, it's a thing that wasn't there in the first place that they're now raising for the first time.

I think it's a violation of Rule 5. I think it was an opportunistic response to the Court's inviting input at an early stage of Your Honor's analysis of this matter.

THE COURT: But this is all with respect to their argument that you don't get to invoke *Presley*, right?

MR. MOFFITT: Yes.

THE COURT: Let me make this as clear as I can. You get to invoke *Presley*.

MR. MOFFITT: I do want to say that this if the Court feels that any part of the question here today turns on failure to object, nothing was ever said about it in the state courts. I think that's significant.

I think it is significant for the way in which Your Honor needs to address this today. I don't wish to recite the procedural history in this case, but the second supplemental answer came about as sort of a gift from Your Honor asking those questions. It hadn't been plead by them in the past.

THE COURT: Even if it hadn't been plead by them, what I have is the Michigan Court of Appeals saying the closure of the courtroom here didn't violate Mr. Pouncey's right to a public trial.

And in order for you to win, you have to show me that that was an unreasonable application or contrary to United States Supreme Court cases. So forget about what the state says.

If those United States Supreme Court cases leave some question about whether the right to a public trial is implicated absent an objection, then the precedence or absence of an objection is certainly relevant to your right to relief, whether or not Mr. Pallas has ever raised it, whether or not the Michigan Court of Appeals ever raised it.

Because your affirmative burden is to show that the Michigan Court of Appeals' decision can't be reconciled with the Supreme Court cases.

So if those cases either turn on an objection or at least don't make it clear whether they're implicated absent an objection, isn't an objection relevant?

MR. MOFFITT: I don't think an objection has anything to do with federal law. They decided cases without objection.

THE COURT: Your point -- your point an objection is purely procedural under state law. It's a purely procedural mechanism to present a substantive claim to a state court. I get that.

MR. MOFFITT: I believe so. Oh, I also want to -- as we have stated in our brief, Your Honor, the violation of the right to a public trial --

THE COURT: Mr. Pouncey, I'm going to -- when he's done, I'm going to give him one last opportunity. So if you would, can you make a few notes when you have a thought?

THE DEFENDANT: Sorry about that.

MR. MOFFITT: Extremely gracious, Your Honor.

It's a structural right which I would respectfully submit entitled us to an automatic reversal.

There's no procedural bars. We have alleged actual innocence and I think that we can establish substantively given that chance, Your Honor.

At this point, Your Honor, I would afford the Court, again, to take -- decide what it wishes to hear.

I would wish to confer with my client briefly to determine if he had anything else he wished me to offer.

THE COURT: I am here for you to tell me what you want to tell me and so I'm not putting any limits on your arguments.

If there's any other points you or Mr. Pouncey wish to make, I'm here, I'm listening very carefully and I invite you to make them.

MR. MOFFITT: I think it would be radical if Your Honor were to decide that *Presley* was new law, for example, Your Honor, or that -- all right. Let me rephrase the issue.

I think it would be unusual -- it would be highly unusual if Your Honor determined that it were not clearly established federal law that no objection is required in order for us to bring this matter to the Court in the fashion that we have, have it reviewed it in the way we did and consider it in the way we have asked. I think it would carry extensive -- I think it would have extensive implications.

And I would respectfully submit that there have not been decisions that have suggested anything consistent with what Your Honor suggests may possibly be that

interpretation.

I would submit that it is clearly established that that is clearly established federal law.

THE COURT: Okay. Why don't you confer with Mr. Pouncy and then you can have your last opportunity to, without restriction, make any other points you want me to consider.

MR. MOFFITT: Thank you, Your Honor.

THE COURT: In the interim, Mr. Pallas, anything you'd like to say?

MR. PALLAS: Thank you, Your Honor. I just -- thank you, Your Honor. I just have one very brief point.

I think brother counsel indicates it would be very odd for this Court to make a ruling in accordance with that the position -- in accordance with the position that the State is asserting.

And I guess what brother counsel is saying that the Second Circuit is just very odd. And I'm not saying necessarily the Second Circuit is correct.

What the Second Circuit's decision reflects is that there's fair minded disagreement on whether or not the -- an objection, the extent of that was part of *Presley* and how it's incorporated into *Presley*. There's fair minded disagreement about that.

If this were a direct appeal, it would be a whole different ballgame, but it's not. It's federal habeas.

There's, obviously, fare minded disagreement as to what the Supreme Court meant; that means that habeas relief is precluded. And that's all I have to say.

THE COURT: What do you say on the issue of not addressing the exclusion of the public from the portion of the proceedings where motions were argued?

MR. PALLAS: We addressed whether courtroom closure was constitutionally --was a Constitutional violation. We weren't talking about -- it wasn't about different phases whether it was motion or *voir dire*.

And, quite frankly, even beyond that, let's say that there was inadvertence on on our part. There is no such thing as a default in federal habeas.

It's not like just because we don't address -- we could have missed an entire issue here, for example, an entire claim out of let's say there were 13 claims, we didn't address Claim 13.

Well, that doesn't give the federal court the right to simply find, okay, I'm going to grant him relief, federal habeas relief on that point.

The Court has to independently find that the prisoner's entitled to federal habeas relief.

But we think we addressed it in the context of addressing the constitutional issue of courtroom closure generally speaking.

THE COURT: You had no intention of confessing error?

MR. PALLAS: Absolutely not. Absolutely not. Thank you, Your Honor.

Unless you have further questions.

THE COURT: I don't. Thank you very much.

MR. MOFFITT: Your Honor, we would respectfully direct your -- this Court's attention to this language in *Presley*. It's at 464 at 511 thereabouts.

In upholding exclusion of the public --

THE COURT: Just give me a minute to get that.

(After a short delay, the proceedings continued)

MR. MOFFITT: Yes, of course.

THE COURT: Which version of The Reporter are you looking at?

MR. MOFFITT: I appear to have -- I don't believe this is any of the common versions, Your Honor. Let me find it in the Supreme Court version.

In upholding exclusion -- I'm sorry. It's at 724 the paragraph that begins in

upholding exclusion of the public.

THE COURT: Give me one second.

MR. MOFFITT: Certainly.

THE COURT: Okay. I can read that to myself. How far do you want me to read?

MR. MOFFITT: Down to the end.

THE COURT: Give me one minute.

MR. MOFFITT: Room for doubt.

(After a short delay, the proceedings continued)

THE COURT: Okay. I read the relevant part of the decision.

MR. MOFFITT: Thank you, Your Honor. All right.

We also wanted to refer Your Honor's attention to *Cole versus Waller*. I wanted it noted that this right to a public trial is regarded as a structural right and speedy trial is a structural right.

THE DEFENDANT: No. No.

MR. MOFFITT: Pardon me.

Right to counsel is a structural right. You don't have to invoke right to counsel. I mean it's applied by the courts in the absence of an objection.

It's of that same special class of rights that the case law addresses that makes it an automatic reversal

if its not complied with.

Your Honor, my client is precocious and probably the most impressive legal scholar I've ever encountered in the correctional system ever.

My client has asked if he might be afforded two minutes to speak to the Court, respectfully, in a scholarly manner regarding a key legal point.

I make the request, Your Honor. He certainly won't waste your time.

THE COURT: I'll give you five minutes, Mr. Pouncey.

MR. MOFFITT: Wow.

THE COURT: Why don't you do it from there. Keep your voice up. Stay seated.

Hold on one second. We're going to turn the microphone on.

PETITIONER POUNCY: I notice you made the analogy about the right to speedy trial. Speedy trial is not a structural error or whatever. But the right to a public trial and the right to counsel's structural error which indicates they're self-executing.

And in *Percy versus Georgia*, the defendant did not explicitly say that he was raising a Sixth Amendment objection. The objection must be specific in order be

preserved.

The United States Supreme Court has shown they're willing to consider this claim. In their own words --

THE COURT: Speak slower. I didn't really mean I was going to time you. I'll listen to you, but please speak slower.

PETITIONER POUNCY: In United States Supreme Court's own words, they said the right to public trial is not only important to the adversaries, but important to the judicial system. That is something that is self executing.

I hate to say that we was sandbagged, but I was represented by an attorney who wasn't prepared and you see that in our other issues. He didn't object to nothing. He didn't file one motion.

Based on their claim that they was making no complaints about a failure to object in the state court --

(Whereupon the court reporter asked the petitioner to speak slower)

Based on their statement that they -- that they was surrendering on a failure to object defense in state court, I would have raised ineffective assistance of counsel based on that failure to object.

I disregarded that issue because they told us they

had no complaints with the failure to object in their brief five years ago in 2010 in front of Judge Haynes.

And I'm asking you justs to review this claim on the merits, do what the United States Supreme Court did in *Presley versus Georgia*, which is issued a writ of *habeas corpus* and allow me to get a fair trial.

And with my family being present during jury selection, they offered me to accept a plea like you penalize me. I didn't want to accept the plea. I told them I didn't want to accept the plea.

It came right after that and -- to the point of where you said about whether it was self-executing or not.

The right speedy trial isn't a structural defect is not the right to a public trial and the right to counsel this Court, United States Supreme Court, Sixth Circuit Court has said you don't have to object to your request for counsel, right to counsel, whatever, during the course of trial, not during interrogation or anything but during the court of trial.

The right to a public trial is an important fundamental right. That's cited in *Presley*. Where did *Presley* go? It says it right here. And I don't see how it can get clearer.

It says it says:

The statement in *Waller* that the trial court must consider reasonable alternatives to closing the proceedings settles the point.

If anything was questionable about failure to object or anything, United States Supreme Court would have summarily decided this case.

And in *Waller* -- I mean in *Waller versus Georgia*, the companion case --

(Whereupon the court reporter asked the petitioner to speak slower)

THE COURT: You want to speak real slow.

PETITIONER POUNCY: Simply because they didn't agree with *Cole versus Waller*, that doesn't mean it's not a precedent. That case is a precedent. They discussed it. It was a companion case.

They said -- they acknowledged that the defense counsel agreed and joined in on the closure in that case.

I didn't do that. I didn't -- my lawyer never told me about, about a public trial right, to be honest. He never told me nothing about it. I would have never waived it, forfeited it under no circumstances.

My family is here now, you know. But the point is this. The public -- I mean the failure to object has nothing to do with the Constitution, has nothing to do

with the federal law. It's a state law.

I shouldn't be barred where the state court reviewed my claim on the merits. This Court should review it on the merits. No United States Supreme Court case has said the defendant must object in order to benefit his -- to enjoy his right to a public trial.

In the cases where they have prevented defendants from benefiting from the closed courtroom based on the lack of objection the court -- I mean the prosecutor asserted that below. They didn't wait two years after the fact to get to federal court to assert it.

THE COURT: Are you asserting in this case in your petition an ineffective assistance of counsel claim based on the failure --

PETITIONER POUNCY: No, I can't because it's not exhausted.

(Whereupon the court reporter asked the petitioner to speak slower)

PETITIONER POUNCY: They told me they wasn't relying on that as a defense.

Can we show him the brief? Do you have that brief I gave when you came to see me Thursday?

In the brief that they filed, I think it was September 9, 2010. September 9 -- no. Maybe it was in 2010. They filed a response to our public trial claim.

They relied -- and the whole point of Mr. -- Mr. Your Honor Leitman is not a mere formality, it is to preserve a claim for appellate review.

So when they say that an objection I needed in order to raise the claim on appeal, they say they have no issue despite the fact -- I mean no issue with me raised on appeal despite an objection.

So why do they said an objection's not needed. It has nothing to do with the United States Constitution, has nothing to do with United States Supreme Court precedent.

Cole versus *Waller* shows that United States Supreme Court is willing to consider, not only consider, but to issue a of writ of certiorari. They only grant one per percent of review. They gave this guy the benefit and his lawyer agreed to it.

I did not agree to it I would never agree to a closed courtroom under no circumstances. I was in there with a lawyer who didn't investigate nothing.

I feel like I was against all enemies. I would never agree to closing a courtroom at all. That's all I ask for is another chance to have a trial.

And when you stopped us from filing additional papers, we was going to move for summary judgment based

on the other 15 issues that we have pending, whatever, that has merit.

But I feel so confident in this public trial case, that after consulting with my attorney, it's a foregone conclusion we're entitled to relief.

They raised -- they can't wait to raise these issues in state court.

THE COURT: Let me interrupt.

Mr. Pallas, should I stay this case right now and let him go back to state court and exhaust the claim that his trial counsel was ineffective for failing to object to the closure of the courtroom?

MR. PALLAS: Well, I think Mr. Moffitt will correct me if I'm wrong, but I believe he's already been back on 6500 process at least once, so there's a possibility that he may not get the review that he's seeking of this particular claim.

It could be that it's inexhaustible, therefore, unexhausted, therefore, procedurally defaulted.

He could attempt, but, normally to go back on a second or successive 6500 motion, there has to be either new evidence or a retroactive change in the law.

THE COURT: Hold on. Let's let Mr. Pallas finish.

MR. PALLAS: That was all that I was going to

say.

Is that if there has been, which I believe there has already has been a motion for relief of judgment, he's precluded from filing a second under very circumstances. But Mr. Moffitt will correct me if I'm wrong.

MR. MOFFITT: We had raised the issue of the ineffectiveness of counsel for failure to object. However, when in the -- when the Attorney General -- when the respondent filed its response that an objection was not needed, at that point, there was no need to make an effective assistance of counsel claim with regard to the failure to object because they conceded that no objection was needed. So at that point, we did not pursue that claim.

And I would regard it as specific point of prejudice that we suffered as a result of reliance upon the respondent's claim that no objection was needed.

MR. PALLAS: Judge, if I could add something that might clarifying something here?

I think what Mr. Moffitt may be referring is to the County Prosecutor not raising the lack of an objection.

But what the County Prosecutor did or didn't do is not at issue, it's what the state court did is what's at issue.

So I'm not sure what the relevance is of what the prosecutor did or didn't do previously, it has to do with looking at the state court opinion, the last recent state court opinion on the issue of courtroom closure.

So I'm a little -- not understanding the relevance of what the prosecutor said or didn't say in their brief.

That certainly doesn't --

THE COURT: Just give me one minute.

MR. PALLAS: Thank you.

(After a short delay, the proceedings continued)

PETITIONER POUNCY: Your Honor?

THE COURT: Yes, Mr. Pouncey. This is your opportunity to kind of sum up if you promise to speak slowly.

PETITIONER POUNCY: I'm just anxious. I've been in prison 10 years. I'm trying to get it all out.

THE COURT: I want you to hear me on this, okay? I understand your situation. I can't say for a second I know what it's like. But I'm going to listen carefully to every word you say.

It will be easier for me to hear you and for the court reporter to take it down if you speak very slowly.

PETITIONER POUNCY: All right.

In the trial court -- I mean I raised this issue

before *Presley versus Georgia* came up. I raised it in 2008. That's was when the United States Supreme Court -- I mean the Court of Appeals rejected it without response from the state at no level. They can't make -- they should be silenced.

I got a case from the United States Supreme Court where it says if they make no issues about any -- I got United States Supreme Court case I can cite it to you.

I got a case from the United States Supreme Court where they made no points of contention about this claim in the state court. They can't wait to get to the higher courts and make contentions. No matter what it is at all; whether it's clearly established law or retroactivity or procedural default. Failure to object amounts to nothing but procedural default under state law. That's the only thing it is. The reason why people object at trial is to preserve it for appellate review.

So when I raised it on appeal and they said defendant didn't object that's not an issue, then it's not an issue. Then they wait until after it was already on direct appeal.

They claim that they raised it or that trying to get you to present or see their point is off the table because they didn't make it.

And even if it was still out -- if they were

allowed to resurrect their defenses or somehow, *Presley* makes it clear. It says that the conclusion that the trial court's -- this is in the Sixth Amendment context.

THE COURT: Slower.

PETITIONER POUNCY: This is in a Sixth Amendment context not a First Amendment context.

It says:

The conclusion that trial courts are required to consider --

(Whereupon the court reporter asks the plaintiff to speak slower)

THE COURT: Slower.

PETITIONER POUNCY: -- even when they are not offered by the parties is clear, not only from this Court's precedence, but, also, from the premise that the process of jury selection is, itself, a matter of importance, not simply to the adversaries, but to the criminal justice system.

And this relies on *Press-Enterprise* which is a case decided before I was even born in 1984. I was born in '87. So that's clear. It was clear at the time of my trial that it was on the trial court.

And *Presley versus Georgia*, the main question was whether it was the trial court's duty to *sua sponte* consider alternatives.

THE COURT: Do you want me to stay this case and give you an opportunity to go back to the state court and raise a free standing claim of ineffective assistance of counsel with respect to the failure to object?

PETITIONER POUNCY: Yes, if you allow me to be on bond.

THE COURT: I'm not going to let you out on bond.

PETITIONER POUNCY: Even though they didn't oppose it?

THE COURT: I'm asking a simple question.

PETITIONER POUNCY: Yes. Yes.

THE COURT: Now understanding that what Mr. Pallas said, that if I stay this case and you go back and try to raise an ineffective assistance of counsel claim for failure to object, his position is going to be it's a second or subsequent motion and you're procedurally barred. So while that's happening, I won't be addressing any issues.

But if you want me to stay this case, I will consider doing that to let you go back to the state court and try to exhaust that claim.

PETITIONER POUNCY: Your Honor, I raised the -- I raised ineffective assistance of counsel

already based on failure to object on my collateral review.

Once they said an objection is not needed, that's when I abandoned it. I relied on their assurance that a lack of an objection wasn't an issue.

You can look at my 6500 motion. I already raised it.

Once they said an objection was not needed, why do I need to raise ineffective assistance of counsel? To them, it's not an issue.

The only thing I was saying my lawyer was ineffective for was not objecting and they saying it's not an issue.

THE COURT: Here what I'm going to do. I'm going to decide the motion for summary judgment in front of me.

Then, depending on what I rule, I will entertain one -- if I deny the motion and I'm not saying I'm going to, this is a very difficult question.

If I deny the motion, I'm going to consider giving you an opportunity at that point to either amend this petition to try to add a claim for ineffective assistance of counsel based on failure to object or to stay this action and let you try to raise the claim in state court.

I'm not suggesting that I would actually allow you to amend. I would want to hear from Mr. Pallas and he's going to tell me it's futile.

I'm just saying if I deny this motion today, there's at least a possibility that you can make an effort to try to bring an ineffective assistance claim to life.

MR. MOFFITT: Your Honor, he's entitled to consider unexhausted claims. I can offer, Your Honor, case law.

THE COURT: We'll get to that if we need to.

PETITIONER POUNCY: If you decide, and contrary to *Presley* version Georgia that an objection that the right to public trial is dependent upon an objection, yes, I would like to raise -- reraise my claim about my lawyer being ineffective at trial.

I would like an Evidentiary Hearing to put my lawyer on the stand to verify his basis for not objecting.

THE COURT: Those are a lot of bridges down the road. We are going to take this one step at a time.

And what I will do is, after I make a ruling on this motion, I will convene a telephone Status Conference.

And at that point, we will talk about what are the

appropriate next steps depending what the ruling is.

If the motion is granted and I rule in favor, I'm assuming Mr. Moffitt will want to ask me to release lease you on bond.

If I deny the motion, you may want to discuss other alternatives about possibly pursuing this ineffective assistance of counsel claim. But we are going to cross one bridge at a time.

PETITIONER POUNCY: All right. This is the -- I'm going to hear you from you one last time. It's unusual to hear from the client at all. I've indulged you, but this is your, your last opportunity.

If you speak too quickly, we're not going to be able to understand what you're saying.

PETITIONER POUNCY: In *Wood versus Milyard* m-i-l-y-a-r-d. It's a 2012 case.

To be honest, Your Honor, I understand that -- it's my understanding you're raising this issue about clearly established law.

They never said nothing about clearly established law. The only complaint that they had is that waiver and you said it's not waived. So they lose. You said it's not waived. That's the only issue they raised.

THE COURT: What I had said was I think that

they're phrasing isn't the same way I would have phrased it.

But I understood them to be making the point that there's no clearly established federal law that a trial court must make the *Waller* findings before closing the court, absent objection. That's what I understood them to make.

I'm not smart enough, Mr. Pouncy, to come up with that argument on my own. That's what I understood them to be making.

PETITIONER POUNCY: They never said clearly established law. They said that the issues -- in their first brief, they said an objection wasn't needed.

They took -- they skipped over Oleno, I think that's how you pronounce it, a 1993 case and took you back to 1950, 1960 and 1961 which is *dicta*.

Those issues -- them three cases have been rejected by *People versus Bond*.

THE COURT: Okay. I think I've heard a good amount and I think I've heard enough on today's motion.

Let me make a few final comments. I'm definitely going to take this under advisement, I'm not going to rule today. I want to reread every word of the key cases that both sides cited.

I want to be sure that I scrutinize the language

from *Presley* and *Waller* that Mr. Moffitt and Mr. Pouncy have asked me to review. But before we leave, I want to make a couple comments.

Mr. Moffitt, I want to commend you. Your dedication to Mr. Pouncy's cause is admirable. You have a tremendous amount of passion. You've put in a ton of work on this case.

I read the affidavits in connection with the reason that a brief wasn't filed immediately. And I saw that at some point you started doing this, I think, without charging Mr. Pouncy.

MR. MOFFITT: Without collecting.

THE COURT: Well, I appreciate and respect the efforts that you have put into this case personally.

You have -- there are times that the volume of filings has caused me a bit of consternation, but it doesn't distract from the fact that you are a real credit to the criminal defense bar in terms of your zealousness and your commitment to your client and not backing down when I asked you the hard questions and doing -- standing up to me when you thought I was wrong, doing everything that I hoped I had done when I was in that chair and I want to commend you. You did an excellent job.

Mr. Pouncy, in my short time with you, I have seen

what Mr. Moffitt said; you are extraordinarily well versed in both substantive law and habeas procedure for somebody who hasn't had formal legal training. And I took seriously all of your oral comments, your insights about the right being a structural one and pointing me to the language in *Presley*. I listened carefully to everything you've said.

I don't know yet whether I'm going to rule for you or against you. But what I hope when you leave here today with the understanding that I listened carefully to what you said, because it was worthy of careful consideration and I appreciate your contribution to the process.

PETITIONER POUNCY: Thank you.

THE COURT: Mr. Pallas, as always, I thought that you did a fine job representing the State.

This is a hard case, but I really appreciate your input in helping me crystalize the issues and understand the complexities that are involved in this case.

So as always I appreciate your input, Mr. Goodkin, you were brilliant today. Thank you for your input.

Okay. We are adjourned. I will take this under advisement and issue a written decision promptly.

(Whereupon court was in recess at 4:10 p.m.)

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from reported proceedings in the above-entitled matter.

s/Carol S. Sapala, FCRR, RMR June 30, 2015